No. 90-6861

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN J. McCARTHY, PETITIONER

v.

MR. MADDIGAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal prisoner seeking money damages must exhaust the administrative remedies provided by the Bureau of Prisons before filing a federal court action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is reported at 914 F.2d 1411. The orders of the district court (Pet. App. 4a-5a and 6a-7a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1990. On December 7, 1990, Justice White extended the time in which to file a petition for a writ of certiorari until January 18, 1991, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a prisoner at the federal penitentiary in Leavenworth, Kansas, filed a pro se complaint in the United States District Court for the District of Kansas pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Claiming that the medical staff at Leavenworth would not give him the particular drugs he demanded for pain and stress, petitioner sought $300,000 in actual, compensatory, and punitive damages.

Petitioner's complaint alleged that a few months after undergoing back surgery he was experiencing pain "most of the time." Pet. App. 12a. The medical staff at Leavenworth had provided him with medication to treat the pain, petitioner said, but this medication was "insignificant." Id. at 13a. Petitioner alleged that the medical staff refused to provide him with the drugs of his choice and that, as a consequence, "at times" petitioner "was forced to purchase contraband drugs." Ibid. Petitioner also claimed that he had a "long history" of serious medical needs and of psychiatric care and that he had received medication in the past "because he is unable to cope with stress." Id. at 12a. Petitioner alleged that the medical staff at Leavenworth exhibited "deliberate indifference" to his "serious medical needs" by failing to prescribe the medication he requested, in violation of his Eighth Amendment rights. Id. at 14a.

The district court dismissed petitioner's complaint without prejudice because he had failed to exhaust his administrative

remedies as required by Brice v. Day, 609 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980).[1] Pet. App. 4a-5a. In support of its ruling, the district court stated that the "administrative remedy process is necessary for the proper and effective hand[l]ing of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance." Id. at 4a.

The court of appeals affirmed. Pet. App. 1a-3a. The court held that its decision in Brice v. Day required a federal prisoner to exhaust administrative remedies before bringing a Bivens action, no matter what type of relief was sought. "Brice made clear," the court stated (id. at 2a), that "'administrative consideration is not to resolve constitutional issues nor to consider damages' * * * but simply to develop a factual record to assist the district court in its review." The court of appeals recognized (ibid.) the decisions of the Third Circuit in Muhammad v. Carlson, 739 F.2d 122 (1984), and of the Sixth Circuit in Goar v. Civiletti, 688 F.2d 27 (1982), holding that the federal prisoner plaintiffs in those cases were not required to exhaust their administrative remedies before bringing Bivens claims limited to money damages, but it declined to alter its own exhaustion rule. The court noted its agreement with the Fifth Circuit, which had concluded that "'a broad exhaustion requirement is particularly appropriate in cases involving federal prisoner complaints against prison officials relating to their * * * treatment during confinement.'" Pet. App.

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[1] The administrative remedy in question is that set forth by the Bureau of Prisons in 28 C.F.R. 542.10-542.16.

2a, quoting Hessbrook v. Lennon, 777 F.2d 999, 1007 (5th Cir. 1985). The court of appeals reasoned that because Bivens actions are a "'creation of the judiciary' * * * it follows that courts may, and indeed must, establish reasonable requirements for bringing such actions." Pet. App. 2a.[2]

ARGUMENT

Petitioner contends that because he is seeking money damages only, the court of appeals erred by requiring him to exhaust administrative remedies. In addition, he maintains that the court of appeals' decision conflicts with decisions of the Third and Sixth Circuits and that this Court should resolve that conflict. We disagree. In our view, the court of appeals correctly decided to require petitioner to exhaust his administrative remedies. And while we recognize the existence of disagreement among the circuits, we believe that review by this Court is not warranted at this time.

1. The court of appeals properly held that federal prisoners must exhaust their administrative remedies before pursuing a Bivens action. Ordinarily, a party is required to exhaust administrative remedies before seeking relief in the federal courts. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). The exhaustion requirement does not preclude judicial relief, but

[2] We have been informed by the Bureau of Prisons that, while his appeal was pending, petitioner filed a number of grievances complaining about the medical treatment he was receiving. His most recent grievance was denied by the warden on March 6, 1991. Petitioner appealed the warden's decision to the Regional Director of the Bureau of Prisons on March 9, 1991.

simply postpones the timing of a judicial determination, Muhammad v. Carlson, 739 F.2d at 124, while establishing a record of the positions of the parties. "[A]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." McKart v. United States, 395 U.S. 185, 193 (1969).

"In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the relevant federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress." Patsy v. Florida Board of Regents, 457 U.S. 496, 502 n.4 (1982). Congress has authorized the Bureau of Prisons to manage and regulate all federal correctional institutions, to provide for prison discipline, and to review, investigate, and respond to prisoner complaints. See 18 U.S.C. 4001 and 4042. Plainly, the Bureau of Prisons, and not the federal judiciary, has primary responsibility for federal prisoners. While the courts must, of course, ensure that the Bureau conducts its affairs in accordance with the requirements of the Constitution, the courts should also be careful not to undermine prison discipline by providing "tickets to an immediate confrontation with the guards and supervisors outside the prison and in the court room." Brice v. Day, 604 F.2d at 667.

In 42 U.S.C. 1997e, Congress sought to foster a system of state administrative remedies for adult prisoners -- a system that those prisoners would be required to exhaust before bringing actions

against state officials under 42 U.S.C. 1983. Congress's purpose in enacting Section 1997e was to encourage the resolution of prison problems by prison administrators, to reduce a backlog of prisoner Section 1983 cases that was "swamping" the federal district courts, to resolve some cases, and to help frame the issues in the remaining cases in order to make them ready for expeditious court consideration. S. Rep. No. 96-416, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. and Admin. News, 787, 816. Congress has also imposed an exhaustion requirement on federal prisoners who seek damages under the Federal Torts Claim Act (FTCA). See 28 U.S.C. 2672, 2675.

Bivens actions are a "creation of the judiciary." Pet. App. 2a. "A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task." Carlson v. Green, 446 U.S. 14, 28 (1980) (Powell, J., concurring). Since this Court has "fashion[ed] for itself a legislative role" by recognizing prisoner Bivens actions (id. at 35 (Rehnquist, J., dissenting)), the federal courts should follow through by establishing rules to govern and channel those actions. Just as Congress has fostered exhaustion requirements for state prisoners bringing Section 1983 actions and imposed such requirements for federal prisoners bringing FTCA actions, the federal courts should require federal prisoners bringing Bivens actions to exhaust the relevant administrative remedies.

As the court below recognized in its earlier decision in Brice v. Day, requiring a prisoner to exhaust administrative remedies

before bringing a Bivens action provides many benefits associated with prior administrative consideration, such as filtering out frivolous or readily resolvable disputes, facilitating development of a factual record, and narrowing the issues in dispute.[3] In addition, an exhaustion rule applied to Bivens actions helps reduce the intrusion of the courts into prison administration, promotes judicial efficiency, encourages the resolution of problems by prison administrators, and prevents the circumvention of established procedures.[4]

This case illustrates the benefits of an exhaustion rule. Requiring a prisoner who complains about his medical treatment to exhaust his administrative remedies by filing a complaint with the Bureau of Prisons would be likely to create a record providing

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[3] Petitioner states (Pet. 14) that it is not clear from the regulations that prison officials prepare a written response to prisoner grievances. However, Federal Prison System Program Statement 1330.7 at p.3 (1979) makes clear that "[r]esponses shall be in writing." That requirement is reflected in the regulations, which provide that inmates and members of the public must have access to the responses and to an index describing the grievances. 28 C.F.R. 542.12.

[4] Petitioner notes (Pet. 10) that the regulations do not provide for the consideration of "tort claims," see 28 C.F.R. 542.12, and suggests that his claim "is categorically excluded from being heard under the regulations." But the regulations provide for the consideration of "a complaint which relates to any aspect of [the complainant's] imprisonment if less formal procedures have not resolved the matter." 28 C.F.R. 542.10. Thus, prison officials would respond to any complaint alleging that a prisoner is being mistreated by prison medical personnel and would be able to provide various forms of relief -- including the provision of alternative medical treatment -- even though they are not authorized to award money damages in such cases. In fact, as noted above, petitioner has filed a number of grievances complaining about his medical treatment since the district court dismissed his Bivens action, and the warden has responded to each complaint.

background on the nature of the prisoner's medical needs, the details of his complaints to the medical staff, and the response of the medical staff to the prisoner's complaints. Furthermore, the filing of such a complaint with the Bureau of Prisons would not only assist the district court if a Bivens suit is ultimately brought, it might serve to conciliate or resolve the underlying issues and thus render a Bivens action unnecessary. Thus, the court of appeals acted reasonably in upholding a requirement of exhaustion.

In this case, the district court dismissed petitioner's Bivens action without prejudice for failure to exhaust administrative remedies. Other courts agree that dismissal without prejudice is warranted in cases like this. Davis v. Keohane, 835 F.2d 1147, 1149 (6th Cir. 1987); Veteto v. Miller, 794 F.2d 98, 100 (3d Cir. 1986). Therefore, petitioner will be able to refile his Bivens action, if he desires, as soon as his most recent grievance is decided. At that time, he will have exhausted his administrative remedies, and the district court will have the benefit of the record that has been compiled.

2. The disagreement in the circuits does not, in our view, warrant this Court's attention. As an initial matter, the courts of appeals agree that exhaustion must be required in some circumstances before a prisoner may bring a Bivens action. Thus, like the court below, the Third Circuit requires the exhaustion of administrative remedies when a federal prisoner seeks injunctive relief as well as money damages. Veteto v. Miller; Waddell v.

Alldredge, 480 F.2d 1078 (1973). Similarly, in Davis v. Keohane, 835 F.2d at 1149, the Sixth Circuit required exhaustion because the prisoner had not "clearly shown that exhaustion would be * * * unable to afford him the relief he requests."

Those two circuits, however, have allowed federal prisoners to proceed directly to court in certain circumstances. In Muhammad v. Carlson, the Third Circuit held that "[b]ecause a prisoner asserting only a claim for damages under Bivens apparently can obtain no relief from the Bureau of Prisons, it would serve little purpose to require him to exhaust administrative remedies before coming into the courts." 739 F.2d at 125. The court distinguished cases such as Brice v. Day, where "the prisoner is seeking more than money damages." Id. at 125 n.1. Similarly, in Goar v. Civiletti the Sixth Circuit excused a federal prisoner from exhausting administrative remedies where the prisoner sought damages only and "the alleged tortious acts were not continuing." 688 F.2d at 29. The court distinguished Brice v. Day by stating that prison administrators might have been able to cure the overcrowded conditions forming the basis of the complaint in that case, but could not remedy the damage from the assault forming the basis of the claim in Goar. Ibid.[5]

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[5] The Seventh Circuit has considered whether exhaustion of administrative remedies should be required in Bivens cases, but has not adopted a position on the issue. In Greene v. Meese, 875 F.2d 639, 643 (1989), the court suggested that "[w]hether complete exhaustion of Bureau of Prison remedies should be required even in cases where the prisoner is also seeking damages, a remedy not found in the Bureau's arsenal, may depend on what the damages are being sought for." The court added that, in certain cases, "[u]nless exhaustion is required prisoners will have an incentive

Thus, for certain Bivens actions the Third and Sixth Circuits permit district court consideration without requiring a prisoner to exhaust his administrative remedies. However, it appears that neither circuit would excuse exhaustion when a prisoner challenges a continuing prison practice.[6] In the present case, although plaintiff seeks only damages (perhaps in an effort to avoid any exhaustion requirement[7]), it appears from his complaint (Pet. App. 11a-14a) that he suffers from continuing physical and psychiatric problems and believes he has never received adequate medication from the prison staff. That is confirmed by the grievances that petitioner has filed in the last year complaining about his medical treatment. See note 2, supra. Therefore, any Eighth Amendment violation arising out of this situation appears likely to continue absent a change in the ongoing medical treatment afforded to this

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to bypass the administrative procedures * * * by suing for damages and raising the identical issues in such suits that they would have raised in a complaint to the Bureau of Prisons if they had filed one." Ibid.

[6] No continuing prison practice was at issue in Goar, where the prisoner complained that he had been injured by an assault by another inmate. 688 F.2d at 28. In Muhammad, the prisoner made two unrelated claims. One of the claims -- based on the prisoner's placement in administrative detention for seven days -- clearly had no ongoing significance. 739 F.2d at 123. The other claim was based on the denial of medical treatment for a back injury; there was no indication in the court's opinion whether the problem was ongoing. Ibid.

[7] Petitioner alleged that "[t]his Complaint seeks 'Money Damage Awards Only' therefor is exempt to the adminstrative appeals exhaustion doctrine. (see; 28 C.F.R. Part 542 et seq.)." Pet. App. 12a. He added, in a footnote to the complaint, "Presently the Plaintiff is appealing." Ibid. Thus, it seems clear that petitioner intended to split off his damage claim and pursue it in court while simultaneously seeking other relief for the same problem through administrative channels.

prisoner by the prison medical staff. It is thus not clear on these facts whether any court of appeals would forgive petitioner's failure to exhaust administrative remedies.

In any event, it may be that a uniform rule with respect to exhaustion is not required. One court recently noted that the federal courts are being "flooded by prisoner litigation." Del Raine v. Carlson, 826 F.2d 698, 702 (7th Cir. 1987). Circuits with greater resources and fewer federal prisoners within their boundaries may be less inclined to require exhaustion of the Bureau of Prison's administrative remedies. Other circuits may fairly conclude that it is more efficient to handle Bivens actions with the benefit of preliminary fact-finding by the Bureau of Prisons. It is not clear that all circuits (or even all districts within the same circuit) must -- or indeed ought to -- handle Bivens cases through identical procedures.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE RESPONDENTS IN OPPOSITION by mail on March 27, 1991.

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March 27, 1991